Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	CG Docket No. 02-278
	)	
Rules and Regulations	)	
Implementing the Telephone	)	
Consumer Protection Act	)	
	)	
	)	

COMMENTS OF PHILIP J. CHARVAT IN REGARDS TO THE PETITION OF THE FAX BAN COALITION RELATING TO THE COMMISSION'S JURISDICTION OVER INTERSTATE TELEMARKETING LAW

Philip J, Charvat ("Charvat") respectfully submits these comments in opposition to the Petition of The Fax Ban Coalition ("Petitioner") relating to its petition seeking to have the Commission preempt state laws regarding interstate fax communications. Charvat also requests that these comments also be accepted as late-filed in any other matters pending before the commission pertaining to preemption of state laws regarding telemarketing and unsolicited faxing which are before the Commission such as DA 05-1347 and DA 05-1348.

Petitioner is asking the Commission to issue a declaratory ruling on preemption of state law civil actions brought under state law regulating interstate solicitations to consumers in state courts. Petitioner claims that state law is "inconsistent" with federal law.

Inconsistency is not a legitimate reason for preemption, and preemption of state rules that are consistent with Commission rules would be an extreme abrogation of State's rights and consumer rights.

First, the principles of preemption are designed to avoid conflicting regulation. Conflict preemption exists when compliance with both federal and state regulations is <u>impossible</u>.

In the matters before the Commission there is no basis for preemption as those wanting to make solicitations can easily comply with both the state and federal statutes. State law that is in harmony with the federal statute and merely places additional restrictions on telephone solicitations directed at a forum state is neither a substantial nor unexpected burden to place upon a solicitor. It is a matter of common sense that any entity wishing to do business in a state must investigate and comply with the state's laws. Parallel enforcement of federal telemarketing laws with state laws is consistent with Congressional intent to create a consumer protection floor (not a ceiling) on telephone solicitations. Furthermore, Congress in passing the Telephone Consumer Protection Act (TCPA decided not to occupy the field and used language within the statute to specifically permit the States to supplement federal regulation. The Congressional intent together with the language within the TCPA is clear and concise: The TCPA rules are a "floor" of minimal standards that must be met.

Because of the telecommunications and other related costs, an entity does not lightly decided to solicit 10 million phone numbers in a state such as Ohio. Not only can telemarketers easily comply with both state and federal laws, but they must do so if they do not wish to find themselves subject to state long-arm civil and/or criminal actions. Ohio law, through its consumer sales protection act (O.R.C. § 1345.01, et seq., "CSPA") and subsequent Ohio court declarations have made any violation of any of the Commissions TCPA regulations concurrent violations of the CSPA for which a consumer may seek state statutory damages and an award of plaintiff's attorney fees. <u>Compliance with this act places, in fact, no burden on any solicitor that is not already placed on it by the Commission's TCPA rules as the "rules" that must be adhered to are, verbatim, the Commission's rules. In any action the Commission may take, it should be careful to distinguish between parallel enforcement though state law of identical rules and the enforcement through state law of non-identical rules.</u> The CSPA does allows a consumer to bring an action under state law seeking the statutory damages provided by the CSPA in addition to seeking damages as proscribed by the TCPA. Ohio has a long history of parallel enforcement of federals acts through the CSPA[1].

[1] *Thomas v. JEL Home Improvement Co., Inc.* Case No. 94-CV-03486, Municipal Court, Hamilton Co., 9-1-94, Case #1443 in the Ohio Attorney General's Public Inspection File, to Fair Debt Collection Practices Act. See also, *Taylor v. Checkrite, Ltd.*, Case No. C-3-82-608, U.S. Dist. Ct., S.W. Ohio Dist., 1-13-86, PIF #743 to Fair Credit Reporting Act. *Ellis v. Hensley*, Case No. 39126, Eight Dist. Court of Appeals, Cuyahoga Co., 8-16-79, PIF #275, et. al. to Truth-in-Lending Act.

Second, in states, such as Ohio where the telemarketing rules that must be followed are identical to the Commission's rules, there is no basis in fact for either the telemarketer or the Commission to seek or grant preemption of the states' parallel enforcement laws – with one exception. That sole exception is that a telemarketer would indeed want to have state law preempted when it is engaged in the willful and habitual violation of the Commission's rules and seeks to preempt state laws which provide an effective means to enforce the TCPA rules which is not readily available to most consumers as detailed below.

Without the benefits of parallel enforcement in Ohio of the TCPA with Ohio law, and other states with their laws, enforcement of the TCPA will fall back upon states' Attorneys General and the Commission. In round numbers there are about 11,000,000 or more residents in Ohio, comprising about 2,500,000 or more households. The TCPA has been in effect for over 10 years, and telemarketing occurs every day of the week, but certainly in 'full force' for over 300 active days per year: the weekdays and Saturdays. Conservatively, the typical household receives one or more telemarketing calls per active day[2]. I have personally logged, in detail, hundreds of such calls by keeping track of whether or not any or all of the TCPA and Ohio rules were violated. While not every call violated a prior Do Not Call request, I have <u>not yet received a single call that fully comported with all the rules</u>. In short, every, or nearly every, call is in violation of the law, especially the identification rules.

Simple math shows that in the last ten years in Ohio there have been placed between 10,000,000,000 and 30,000,000,000 nuisance[3] telemarketing calls (representing 1,000 to 3,000 disruptions per person), virtually all of which violated either the TCPA's rules or Ohio law. The TCPA provides for three entities in Ohio to enforce its provisions: (1) the FCC, (2) the Ohio Attorney General, and (3) private citizens who receive the calls. In the last 10 years, the FCC has issued only about 10 citations to Ohio telemarketers (all at the behest of private citizens who filed complaints with the FCC). Similarly Ohio's Attorneys General have, to the best of my knowledge, taken action against only *about six or seven* TCPA violators. That's ten to thirty Billion calls in violation of the laws, and only a few prosecutions by an Ohio Attorney General and almost no proactive enforcement by the FCC in Ohio. Thus the only <u>significant</u> enforcement of the TCPA in Ohio has been by

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[2] Recently the Direct Marketing Association claimed 70,000,000 calls are made per day nationally. Proportioning these to reflect Ohio's population, this would be about 3,000,000 calls per day in Ohio, and 10 Billion calls in Ohio since the TCPA was enacted. Anecdotal experience indicates that this DMA estimate is low. For computational purposes 3 calls per day have been assumed to estimate the higher estimated total.
[3] S. REP. NO. 102-178 at 1 (noting that telephone solicitations are both a nuisance and an invasion of privacy).

individuals who file claims. Enforcement of the TCPA by consumers is the lynchpin of the TCPA enforcement, and parallel CSPA enforcement is a key to that enforcement.

Most consumers are effectively helpless to enforce the TCPA through individually filed small claims court actions. A typical small claims action filed by a consumer is usually heard with the defendant represented by professional legal counsel, or by company representatives intimately familiar with the law and the courtroom, and the resulting mismatch of legal skills frequently results in a loss at trial or on appeal and in the consumer abandoning future attempts to enforce the TCPA. A provision of the CSPA provides for a consumer's attorney fees to be paid by the defendant if the consumer prevails at trial. This provision is not in conflict with any federal law or any Commission rule, but it does serve to "level the playing field" for a consumer suing an entity that is ready to drown the typical Pro Se consumer in legal procedural motions designed to frustrate a his legitimate claims.

As a concrete example, consider the Federal Trade Commission's ("FTC") telemarketing sales rule requiring that all sales calls begin with 'a clear statement that the purpose of the call is to make a sale.'[4] There is no federal cause of action with statutory damages to enforce this rule. I have not yet received any call that complied with this regulation, nor have I heard of anyone who has. Has <u>any</u> reader of this document received a <u>single</u> call that complied with that FTC rule? This example proves the point: No enforcement results in no compliance. Preemption of state's telemarketing laws will have the inevitable effect of nearly eliminating enforcement of the TCPA by consumers who are currently the backbone of TCPA enforcement.

I have read the comments of Robert Biggerstaff ("Biggerstaff) submitted to the Commission pursuant to Docket No. 02-278. I wholeheartedly agree with Biggerstaff and in particular with his "common sense" analysis presented in Section 10. Any entity doing business (including solicitations to do business) in a state should not be exempted from that state's laws. This should be the case whether or not the entity has hired an out-of-state entity to solicit from across the state's borders. Indiana is a good neighbor state to Ohio. If the Ohio legislature were to pass an act prohibiting loud broadcasting of solicitations (via concert style audio amplification) to consumers' homes, would it not be common sense that Ohio could enforce this act against a domestic business entity even if the entity hired an agent to set up the speakers two feet inside of Indiana to dun households in Ohio near the border?

[4] 16 CFR § 310.4 (d) (2).

In summary, Charvat believes the Commission should not preempt any state telemarketing laws because: 1) Had Congress wanted state laws preempted, it would have provided clear statutory language in the TCPA to that effect – and therefore the Commission should defer preemption decisions to the courts; 2) State laws, which are otherwise consistent with the Commission's (and FTC) rules are a legitimate burden for a business seeking to do business in a state to bear; and 3) There is no reasonable basis for the Commission to object to a state enforcing state laws completely consistent, and not more restrictive, with Commission or FTC rules.

For all the above reasons, Charvat believes it is in the best interests of consumers, for whom Congress passed the Telephone *Consumer* Protection Act to deny any petitioner's attempt to have any states' laws preempted and thereby shield the willful violation of state laws.

Respectfully submitted,

/s/

Philip J. Charvat
636 Colony Drive
Westerville, Ohio 43081-3616